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Educating the New Lawyer: Teaching Lawyers to Offer Unbundled and Other Client-Centric Services

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Educating the New Lawyer: Teaching Lawyers to Offer Unbundled and Other Client-Centric Services

Forrest S. Mosten, Julie Macfarlane,
and Elizabeth Potter Scully

ABSTRACT

In this article, Forrest Mosten and Julie Macfarlane build a new bridge in their 30-year professional relationship by linking their separate but complementary work in access to legal services, helping the self-represented litigant (“SRL”), transforming the lawyer from gladiator to problem-solver and conflict resolver, and using interdisciplinary team triage in Collaborative Law and preventive conflict wellness to better serve the public. The New Lawyer and Unbundled Legal Services are independent concepts that the three co-authors link in proposing new topics (including the concept of Legal Coaching, which is evolving from the unbundled model) and pedagogical approaches to teaching law students and practicing lawyers.

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I. WHO IS THE NEW LAWYER, AND WHERE DID SHE COME FROM?

The concept of the New Lawyer emerged organically from a series of empirical research studies conducted by Julie Macfarlane in the 1990s. Each of these studies evaluated the work that lawyers were doing with clients, especially in response to the incremental introduction of mediation and other dispute resolution programs. The studies were primarily qualitative and interview-based, allowing Macfarlane to drill down into what appeared to be signs of cultural change in the way that law was practiced and the growing empowerment of clients, both corporate and personal.

These studies that grounded the first edition of Macfarlane's *The New Lawyer: How Settlement is Transforming the Practice of Law*¹ included both court-based dispute resolution programs and private dispute resolution processes outside the court. The first edition was motivated by Macfarlane's realization that she was seeing consistent patterns and themes in the disputing landscape. These studies were conducted in both Canada and the United States, but the patterns were the same. Similar challenges faced lawyers whether they served commercial or personal clients, as each client group began to assert (in an era of declining deference for professionals and growing client empowerment) their expectations of expeditious and cost-effective resolution.

Macfarlane observed a growing acceptance among lawyers of all stripes of the need to update and adapt core legal skills. Whereas in the earliest studies in the 1990s there were a fair number of "Oppositionists" arguing that mediation was a "fad" that would shortly be over. By the 2000s, older lawyers with reservations about dispute resolution were describing themselves as "dinosaurs," having come to the realization—reinforced by the "vanishing trial" and the crippling expense of protracted litigation—that they were now out of step with the prevailing settlement culture.

Macfarlane concluded that when lawyers—and by refraction, their clients—described the skills they needed to be effective as

1. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (Vancouver: BC, UBC Press 2008).

conflict resolvers, their focus was on a new skill set that could replace the traditional “rights warrior” model of zealous advocacy they had been trained to embrace. This zealous warrior approach, they recognized, had limited usefulness when almost every case settled and those brilliant legal arguments they had spent hours honing would make, at best, a limited difference to the eventual outcome. The New Lawyer is an evolved, contemporary version of the rights warrior who can set aside assumptions of adversarial behavior and understand when to strategize about accommodation, trade-offs, and problem-solving to achieve her clients’ goals. She is a “conflict specialist” who must continuously advance the possibilities of just and strategic settlement.

Positional zealous advocacy, which racks up legal costs, is not a strategy that the savvy clients of the Internet age tolerate very well. Moreover, modern clients want to know exactly how and why their money is being spent. This suggests the need for a more transparent and flexible approach to billing clients, as well as delivery models that include the client more robustly in both tasks and decision-making. The emergence of the New Lawyer reflects a vastly changed marketplace in which clients are shopping for value-for-money like never before and are questioning what added value lawyers bring. Lawyers no longer have the monopoly on legal information. It is no longer enough for lawyers to market themselves exclusively as rights warriors who bring everything to a judge.

Reflecting what she heard from both lawyers and clients, Macfarlane developed the idea of “conflict resolution advocacy”—a bundle of knowledge, skills, and attitudes that epitomize the essence of the New Lawyer. This is a very different concept than traditional adversarial advocacy. Instead of assuming that only unyielding positional argumentation will be effective in advancing clients’ interests, conflict resolution advocacy recognizes that the best solutions come from working constructively with the other side:

In conflict resolution advocacy, the lawyer’s responsibility for the best possible client outcome is not diminished. In fact, advocacy as conflict resolution places the constructive and creative promotion of partisan outcomes at the centre of the advocate’s role and sees this goal as entirely compatible with working with the other side—in fact, this goal can be achieved only by working with the other side.²

2. JULIE MACFARLANE, *THE NEW LAWYER: HOW CLIENTS ARE TRANSFORMING THE PRACTICE OF LAW* 115 (Vancouver, BC: UBC Press 2d ed. 2017).

The focus of conflict resolution advocacy is not the making of legal arguments—although these still have their place for the development of a strong “Best Alternative to Negotiated Agreement” (BATNA).³ Instead, the focus is on conscientious review of what the likely outcomes might be, recognizing that a trial is highly unlikely. Conflict resolution advocacy is still very much advocacy, but it is a deep exploration of how to achieve as much as possible of what the client desires and needs within a realistic time and costs framework:

(T)he New Lawyer will understand the advocacy role as more than fighting on his or her clients’ behalf. Evaluating what outcomes are most durable, realistic, and cost-effective requires a deeper analysis than zealous advocacy offers. It requires discussion of client goals that goes beyond the information deemed necessary to formulate a rights-based approach in order to produce a more complex, multi-layered version—for example, considering business goals and priorities, weighing the needs of the client for closure, and re-emphasizing the needs and interests that lie behind the asserted positions.⁴

Conflict resolution advocacy requires a new emphasis on intentional negotiation skills. The New Lawyer is an intentional negotiator, working closely with her client to choose the timing of an opening proposal, developing a constructive bargaining relationship with the other side, asking effective questions of the other side in a way that will produce answers, and creating as many options for resolution as possible. These skills deserve to be the center of the law school curriculum, because they are the center of what lawyers actually do.

Macfarlane argues that the intentional negotiation skill set of The New Lawyer should include “constructive conflict engagement,” an idea developed by Bernie Mayer in his writing and mediation practice. Conflict engagement means a hands-on approach to the dispute that enables clients to see how the money they are expending is being used to progress the case, and to evaluate the options “instead of waiting for something to happen.”

Conflict engagement does not necessarily mean resolution, as Mayer is at pains to point out. Instead, it is an attitude that allows

3. “Best Alternative to Negotiated Agreement,” *coined in* ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: HOW TO NEGOTIATE AGREEMENT WITHOUT GIVING IN* 97 (1991). A strong BATNA is a source of negotiation power. *See id.* at 97–106.

4. MACFARLANE, *supra* note 2, at 115.

for a realistic, hopeful, and ultimately value-affirming appraisal of conflict from both a cognitive and an emotional perspective . . . Instead of waiting for something to happen—a legal event, discoveries, perhaps an approach from the other side—*conflict engagement means facing the realities and the impact of the conflict on the client, even at an early stage in litigation.*⁵

Conflict resolution advocates are going to be more proactive—and a lot more curious—than traditional zealous advocates about what might be done to address the dispute from the very beginning of the attorney-client relationship. This requires a constant conversation between lawyer and client.

Many lawyers have developed New Lawyer skills and tools in the course of their practices, especially those who focus on early and intentional settlement wherever possible, and especially via those participating in court-referred programs or private processes such as collaborative law. But these lawyers had to pick up these skills as they went along and, in a way, re-educate themselves after a legal education which emphasized formal propositional knowledge over personal skills and fighting over settling. What would it look like if the profession began developing the New Lawyer's skills and attitudes in law school? How could law students and young lawyers be encouraged to place intentional negotiation and constructive engagement at the center of their practices?

The second edition of *The New Lawyer*⁶ integrated data from several further studies, most importantly perhaps a two-year study (focused on the litigants themselves) of the reasons for self-representation, which is growing at an exponential rate in both Canada and the United States. This study found that the primary reason so many litigants now go to court without counsel is affordability—most people cannot afford to pay for extended legal services. The self-represented litigant phenomenon still reflects many of the trends that Macfarlane observed in the first edition, with savvy clients accessing legal information online and challenging an inflexible model of legal services (the full representation with retainer model) that seems to deny them the agency they want for the carriage of their own disputes. What types of flexible service models would carry forward and implement concretely the values and goals articulated for the New Lawyer and meet the changing needs and ex-

5. MACFARLANE, *supra* note 2, at 12, (citing BERNARD MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (San Francisco: Jossey-Bass/Wiley 2004)) (emphasis added).

6. MACFARLANE, *supra* note 2.

pectations of modern clients? Unbundled legal services and legal coaching offer promise.

II. UNBUNDLING: AN OVERVIEW

Building on his own practice experience, as well as the growth of the self-representation movement as researched first by Bruce Sales and Connie Beck for the ABA Committee on the Delivery of Legal Services⁷ and more recently by Macfarlane and others, Forrest S. Mosten developed the concept of unbundled legal services in the early 1990s.⁸ Unbundling, also known as “limited scope” or “discrete task” representation, is defined as an attorney-client relationship in which the client is in charge of selecting one or more discrete lawyering tasks contained within the traditional, full service legal services package. The limited scope services can be broken down vertically or horizontally. In “horizontal” unbundling, the lawyer takes on only specified discrete issues (e.g. child support, but not property division) or sub-issues (e.g. the marital residence, but not the retirement plan). “Vertical unbundling” breaks down services into primary categories of tasks, specifically: (1) advising the client; (2) legal research; (3) gathering of facts from client; (4) discovery (both formal and informal) of facts from the other party and witnesses; (5) coaching and representation in negotiations; (6) drafting correspondence, contracts, and court documents; and (7) coaching and limited representation in court, mediation, and other dispute resolution processes.

In the traditional full-service package, the lawyer is engaged to perform all the tasks listed above, as called for by the demands of the case. With unbundling, the lawyer and client work together deliberately and purposefully to allocate the division of tasks. This allocation depends both on the demands of the case as well as the needs and capability of the client. The unbundled attorney-client relationship specifically contracts for (1) the extent of services provided by the lawyer; (2) the depth of services provided by the lawyer; and (3) allocation of communication and decision-making control between lawyer and client during the unbundled engagement.

7. Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 597 (1993).

8. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421 (Fall 1994); *Unbundled Legal Services*, WIKIPEDIA, https://en.wikipedia.org/wiki/Unbundled_legal_services (last visited March 24, 2018).

A. *Examples of Unbundled Legal Services*

Advice from the lawyer (both legal and beyond) is the essence of unbundling. Lawyers can advise as a standalone service or in conjunction with other unbundled tasks. Supplying substantive legal and process information, helping clients better define their goals and objectives, providing emotional empathy and support, and giving recommendations for client action that will pay off are the kinds of advice that help clients achieve better results. Advice can be provided in direct conversation with the client sitting together in the lawyer's office, the client's home, or in another setting. Other unbundled lawyers render advice through email, video conferencing, or over the telephone.

An unbundled lawyer can be a shadow coach in helping the client prepare a letter that will be sent by the client. The client can also purchase the credibility or power of a lawyer's letterhead. Either the lawyer or client can initiate a draft with the other reviewing and commenting on it. Just as when the client sends the letter, it can be initiated by either client or lawyer. The scope of the lawyer can be limited to the letter itself or combined with negotiation that might follow. One major benefit to families of having lawyers help with drafting is to tamp down adversarial or personally provocative communications (especially between spouses) that might further harm the family.

Court documents can be drafted by either lawyer or client. If the client is responsible for this task, the lawyer serves as a coach to explain which documents are necessary and how best to fill them out. Different jurisdictions have different rules and policies as to whether a lawyer must disclose her involvement in drafting a court document. The majority rule requires such disclosure. The minority rule affirms the confidentiality of the lawyer's role and does not require disclosure.⁹

Since lawyer preparation and appearance in court accounts for increase legal fees, many SLRs feel that they have no option but to "go it alone" in court. The limited scope lawyer coach can play an important role in helping the SLR formulate litigation strategy, decide which documents to file in court and assist in preparing them,

9. See A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS 12–16 (2014), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf.

review documents from the other side and prepare a response, and walk the client through the protocol of court procedure.¹⁰

Most spouses want to avoid court through productive settlement negotiations. However, relationships that have frayed to the point of divorce often suffer from communication deficiencies. Spouses might never have negotiated well (perhaps lacking models in their families of origin) rendering an inability to solve problems together: the reason for the divorce itself. If SLRs enter the legal arena without supplemental negotiation help, it may be too much to expect improvement in their ability to negotiate with each other. Coaching for an SLR is even more important if the SLR is negotiating with a lawyer representing the other spouse.¹¹

In addition to “cleaning up” a client’s hostile or positional language, a negotiation coach can help an SLR identify and prioritize her needs and concerns to formulate a negotiation plan. Solid coaching helps the client develop workable fallback positions to maximize the opportunity for settlement. In addition to giving advice, the coach can role-play with the SLR client, simulating negotiation interactions to help the client prepare.

Unbundling is becoming widely accepted and firmly established. To the surprise of many, the single greatest supporter of unbundling has been the American Bar Association. Housed in the Standing Committee on Delivery of Legal Services,¹² the ABA has championed unbundling by, among other things, spearheading the modification of Model Rule 1.2(c) within the initiative of Ethics 2000 led by Hon. Laurie Zeon; the House of Delegates passing a supporting resolution for unbundling; the publication of a White Paper setting forth a history of ethical developments in support of unbundling; and a comprehensive online unbundling resource center that provides state by state ethical rules and opinions, cases, reports, professional literature, and other important resources. States have followed the lead of the ABA with energetic programs involving toolkits, PowerPoint presentations, and training pro-

10. Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. DISP. RESOL. 659, 665 (2013); FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, UNBUNDLED LEGAL SERVICES: A FAMILY LAWYER’S GUIDE 121–39 (2017).

11. See Forrest S. Mosten, *If You Decide to Go It Alone: A Guide for Working with Your Spouse’s Lawyer*, 40 FAM. ADVOC. 37, 37 (Summer 2017).

12. Until his retirement in 2018, Will Hornsby had been Staff Counsel and the guiding light to this committee for nearly 30 years.

grams.¹³ Every provincial Law Society in Canada now has or is developing a regulation permitting the delivery of unbundled legal services and some provinces are actively establishing rosters of lawyers offering unbundling.¹⁴ Unbundling is here to stay.

B. Variations on the Unbundling Theme

1. Legal Coaching

A variation on unbundling is a more explicitly client-tasked model in which the lawyer “coaches” her client to do the work herself. The 2013 National Self-Represented Litigants Study¹⁵ (“NSRLP”) in Canada, followed by the 2016 Cases without Counsel study¹⁶ in the United States, both found that SRL’s were looking for an expert who could work with them in a partnership—akin to the attorney-client partnership described in *The New Lawyer*—to enable them to represent themselves.¹⁷ For example, 86 percent of the SRL respondents in the Canadian study said that they were still looking for legal assistance, but on their terms, meaning affordable services that respected their own agency and self-determination.¹⁸ The coaching model that has been developed since 2013 and promoted by the NSRLP has three major elements:

- Procedural Coaching:

This means assisting a client to understand court rules and procedures, including the identification of appropriate court forms, their accurate completion, filing and service procedures, the submission of evidence in advance of a hearing, and next steps at any stage in a particular legal process. This might include advising on which of several available procedures a litigant should follow or of-

13. See *Unbundling Resource Center*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources.html (last visited Mar. 24, 2018).

14. This includes Ontario and British Columbia, Canada’s most populous provinces. Alberta and British Columbia are establishing a roster of lawyers offering unbundling. See *The Alberta Limited Legal Services Project*, ALBERTA LEGAL SERVICES, <http://albertalegalservices.com/index.html> (last visited June 4, 2018).

15. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (2013), available at <https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf>.

16. Natalie Anne Knowlton, et al., *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2016), available at <http://iaals.du.edu/honoring-families/publications/cases-without-counsel-research-experiences-self-representation-us>.

17. *Id.*

18. *Id.*

fering an interpretation of applicable procedural rules based on the specific facts of the client's case.

- Hearings Coaching:

Hearings Coaching can include explaining the expectations that a neutral decisionmaker has of the parties, such as when they will be asked to speak, how they should address the decisionmaker, how to organize and present materials, how to structure an oral presentation, how to dress for the hearing, and so on.

If a lawyer coach accompanies the client to the hearing, the lawyer coach could further assist by, for example, explaining the meaning of legal expressions used by a judge or other court officer, provide on-the-spot advice on how best to respond to the other side and/or to the judge/hearing officer, ensure the client understands the outcome of the hearing, and any next steps.

- Negotiation/Settlement/Mediation Coaching:

SRLs are often intimidated or confused by the now commonplace legal procedures that try to nudge the parties towards settlement, including mediation and settlement conferencing. Coaching could include procedural advice about these processes as well as assistance identifying possible areas of substantive agreement and even preparing a settlement proposal. Lawyers can contribute to designing the process of the mediation (e.g. selecting the mediator who is the best fit and advising clients about the pros and cons of caucus sessions) to best meet the needs of their clients. They can also assist clients in articulating and prioritizing needs and interests, preparing opening statements, developing an agenda, understanding the principles of law that could support negotiation positions, and preparing for negotiations.

2. *Limited Scope Court Appearances*

While early unbundling scholarship did not include having the lawyer make special appearances, the increase of self-represented litigants in court and support by the judiciary for limited services to help them has led to more lawyers representing clients in court within a limited scope. States have promulgated forms to document limited scope court appearances that put the court and the other party on notice.¹⁹ These forms often include protocols for ending

19. See CAL., FL-950: NOTICE OF LIMITED SCOPE REPRESENTATION (2017), http://iaals.du.edu/sites/default/files/documents/publications/fl950_-_notice_of_lim

the limited scope representation without requiring court hearings or judicial acts to confirm such change of representation. Courts are cognizant of the fear many lawyers have of getting “stuck” in a case, as often occurred in the past when judges declined to grant withdrawal motions following special appearances due to a concern that litigants might be abandoned. In unbundled limited appearances, the consumer’s choice to have some legal help rather than none is increasingly supported by judges, provided that informed consent and other requirements are met.

3. *Mediation Consulting*

Mediation has exploded both within the court and in the private sector. In addition to coaching before a mediation (above), when lawyers are present during mediation sessions or on call, litigants can receive immediate help evaluating proposals and developing counter-proposals and are better-situated to capitalize on settlement opportunities.²⁰

4. *Preventive Legal/Conflict Wellness Interventions*

Dealing with legal problems that have already arisen can be a full-time job. However, managing and preventing future conflict is just as important. SLRs do not have the benefit of lawyer input to plan for future tax savings, obtain timely mental health assistance, or assess their current situations for potential legal hotspots. While few will engage a lawyer asymptotically (i.e. to talk about estate planning or future conflict prevention), within the unbundled relationship, lawyers can counsel clients about compliance with agreements and orders and help set up processes to minimize future disputes and prevent issues from escalating into full-blown acrimony or litigation.

ited_scope.pdf; COLO., JDF-630 CIVIL NOTICE OF LIMITED APPEARANCE (2011), <https://www.courts.state.co.us/Forms/PDF/JDF%20630%20CIVIL%20Notice%20of%20Limited%20Appearance%2010-27-11.pdf>; MASS., NOTICE OF LIMITED APPEARANCE (2011), <http://www.mass.gov/courts/docs/forms/district/notice-of-limited-appearance.pdf>. These are among the leading jurisdictions in promulgating such form notices. These notices are key tools in expanding the comfort and use of unbundled legal services.

20. See generally HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER IN ANY COUNTRY OR CULTURE* (2d ed. 2010); DWIGHT GOLANN, *SHARING A MEDIATOR’S POWERS, EFFECTIVE ADVOCACY IN SETTLEMENT* (2014); ERIC R. GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994); FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, *COMPLETE GUIDE TO MEDIATION* (2d ed. 2015).

III. FAMILIAR TASKS, NEW MINDSET

Unbundling has never been entirely newfangled. Even in traditional representation, lawyers have sometimes unbundled; common examples include offering second opinions, drafting one or some documents and having the client or other professional draft the rest, or just providing an initial consultation or advice on an ad hoc basis. The concept is not new to clients either. Corporations hire in-house counsel to handle part of the job and to manage which services will be purchased from other lawyers and on what terms. Higher income individuals know that it makes sense to use different lawyers for different tasks and to manage those lawyers' time effectively by having non-lawyers (e.g., accountants, bookkeepers, business managers, personal assistants) do a good deal of the legwork. Lower income people unbundle involuntarily when they pick up a form from a community legal services office, given that budget cuts have limited many agencies' ability to provide full service representation.

As with the New Lawyer, however, unbundling does require a new and different mindset than traditional lawyering. There is increased contact with clients, some giving up of traditional "leave it to me" control, flexibility about the client's own role (e.g. how much of the work the client wants to do herself with coaching from the lawyer), willingness to work in innovative fee arrangements (e.g. not requiring advanced payment of deposits), understanding and patience with clients' possible poor decision-making or self-destructive actions, and sometimes operating like a coach on the sidelines rather than being in the "game." The target demographics for unbundling are also evolving. While lawyers have long unbundled their services for repeat clients, and often for clients in higher educational strata, modern unbundling has grown in its application to a wider demographic, largely due to the explosion of self-represented litigants. The increased number of SRLs, combined with New Lawyer values and perspectives, have made unbundling an established and growing part of lawyering for middle income individuals who cannot afford full representation but do not qualify for legal aid programs. These changing mindsets and changing client populations have profound implications for lawyer education and training.

IV. INTEGRATING THE NEW LAWYER AND UNBUNDLED LEGAL SERVICES INTO LAW STUDENT EDUCATION AND LAWYER TRAINING

At their core, the models of law practice developed by Macfarlane and Mosten are designed to address common client values and goals. For example, empowered clients of the 21st century have unprecedented access to self-help legal information and are eager to do some of the legal work themselves. Clients want to control legal costs. Clients want to buy services a “bite” at a time rather than handing over control to the lawyer. Clients want to maximize independence and self-determination. Clients want their lawyers to be conflict management specialists who emphasize client-centered, voluntary private settlements, rather than public adversarial litigation. Finally, clients want to feel that the legal services they are buying are effective, in terms of both results and costs.

Legal education needs to instill the new mindset needed to practice the New Lawyer way and reflect this profound reconfiguration of lawyer-client relationships to meet the needs and goals, both financial and self-determinative, of modern clients. We urge law schools and the legal profession to embrace the dual concepts of New Lawyering and Unbundled Legal Services in the following ways:

- Integrated Courses and Trainings;
- Standalone courses and trainings in the New Lawyer, Unbundled Legal Services, and Client Coaching, with cross references to the other concepts; and
- Modules of both concepts within traditional law school courses and substantive lawyer continuing education.

In the next section, we discuss specific examples of how each of the authors has tackled the challenge of teaching New Lawyering and skills for both unbundling and legal coaching. They are intended as points of departure for future articles by us and (we hope) others that delve deeper into course design and specific curricula for instilling the client-centric principles common to our conceptions of the lawyer’s role and models for legal services delivery.

A. Teaching the New Lawyer

Macfarlane designed and taught a class on the New Lawyer at Windsor Law beginning in 2004. The class, now called Lawyer as Conflict Resolver, is still offered. It is currently taught by Windsor Law alumna Kadey B.J. Schultz of Shultz Frost, and it is extremely popular.

The course overview explains the purpose and objectives of the class as follows.

The nature of legal representation and advocacy is changing as participation in both mandatory and voluntary settlement processes becomes increasingly common. As a consequence, some are beginning to question the way that lawyers are prepared for practice and the focus of much of law school education on adjudication and appellate advocacy. Beginning with a discussion of core traditional concepts of representation and advocacy, this course evaluates how these values and skills are challenged and reconceived as lawyers act as client agents in negotiation, mediation, settlement conferences, collaborative law, and other settlement-oriented processes.

As any profession, legal practitioners have to respond to changes in their professional environment. For lawyers this means paying particular attention to client demands and expectations, political and social reforms, and the economic climate. The dominant image of the lawyer as the “agent of war”—partly a consequence of the development of large corporate law firms—is increasingly questioned by clients and commentators alike. The emergence of lawyers’ organizations and movements—for example, the development of collaborative lawyering networks, the holistic law movement, and the development of therapeutic jurisprudence—reflects the appetite for change among some practicing lawyers.

In this course, we shall explore and examine an emergent model of the Lawyer as Conflict Specialist (later changed to “Resolver”) using a number of different lenses for practice exercises and discussions, including the lawyer as co-operative negotiator; the lawyer as mediation advocate; the lawyer as collaborator; the lawyer as client coach; and the lawyer as dispute systems designer and procedural strategist. In particular, this course will consider the impact on lawyer/client relationships, the impact on lawyer/lawyer relationships, the character of client advocacy in settlement processes and some of the ethical challenges presented. The course will first examine the traditional ‘dominant’ notion of advocacy for lawyers, its origins and rationale, and the debates and their implications for practice that exist within this traditional framework (the lawyer as hired gun, the lawyer as wise counsellor and so on). How do lawyers provide the conflict resolution services that clients want and need in the 21st century?²¹

21. Course Prospectus, Julie Macfarlane, Faculty of Law, University of Windsor (2014) (on file with the author).

The class begins by setting a tone for a deeply reflective and intensely practical and participatory program. Students are asked to consider their major goals for the practice of law, including the central question, “What kind of lawyer do you want to be?” Students often think that this question refers to what type of substantive law they want to practice, and this exercise is an opportunity to shift the focus to a reflection on what type of client they want to serve and how they understand their own values as a lawyer. What motivates and what moves them? By considering their personal role models and sharing the reasons they came to law school in the first place, students begin to turn their attention towards developing the skills and attitudes that will enable them to be a New Lawyer.

In an opening weekend intensive, the class considers what research tells us that lawyers actually do. This may be the first time that these students have been given information about settlement levels and, in recent years, the volume of SRLs in the justice system. These essential facts typically come as a shock and have a profound impact on how students begin to think about their own legal practice and what they need to know and to be able to do.

The next section of the course is a training in the elementary principles of negotiation, emphasizing interests-based approaches and information exchange through both talk and roleplays. This sets a foundation for the next topic which is the role of the lawyer as a mediation advocate. The way in which lawyers can provide most effective advocacy for their clients is a central theme in all these exercises and discussions. All the roleplays include clients, either in or out of the room where the negotiation or mediation takes place (sometimes actors from University of Windsor’s drama program). Students are encouraged to distill the most practical questions, for example: how does a lawyer talk with her client about settlement? How do they share decision-making? How does a lawyer deal with client expectations that they should be the swaggering, silver-tongued, adversarial lawyer of television fame? How does interest-based bargaining and mediation change the attorney-client relationship and the balance of power? What gets talked about? And so on. Sometimes it is difficult to end these discussions and send the students to the next class.

Lawyer as Conflict Resolver also includes a class on ethical issues that arise in the course of legal practice, framed in the context of real-life—where dilemmas rarely fit the precise precepts of an ethical code—and personal values. Within the context of their overall ethical obligations to clients and courts, students are encouraged to develop their own value-based approaches, and to

think about these as foundational to who they will be as a lawyer. There is a class on advice-giving and legal knowledge that addresses the reality that lawyers are no longer the “gatekeepers” of legal information, and that their clients are looking for something more from them than simply what they can read on the Internet: practical applications, honest appraisals of their chances of success in meeting their goals, strategic advice, and a genuinely empathetic attitude. These are all important characteristics of the New Lawyer.

Each class and topic also integrates ideas and discussions about delivery models. The huge increase in the number of self-represented parties has encouraged many personal service lawyers to consider offering unbundled services, flat fee services, and legal coaching. Students are open to these ideas because they have not yet absorbed some of the market protectionism that continues in many parts of the legal profession. They are also ready to discuss how to reduce overhead to make services more affordable for clients, and how to work with clients remotely using Skype or other programs. The final class returns to the theme of “What type of lawyer do you want to be?” By now they all have many, many ideas that will hopefully carry them into legal practice.

Macfarlane has also developed and conducted many workshops on the New Lawyer for practicing lawyers. These workshops are of course shorter than the Windsor law school elective—single day or sometimes two-day programs, rather than 30 hours of classroom time—but usually focus on a selection of the same topics described above. One important difference is that the workshop typically begins, depending on size, with either a discussion or a structured small group exercise on the types of change that participants are seeing in their own practice since they were called to the Bar and the trends they anticipate in the future. This is always a very animated and dense conversation, with many observations, ideas, and reactions shared. Unlike the law students, lawyers in practice also talk about how they see client expectations and needs changing. With its emphasis on the reality of change, this opening segment sets the tone for the remainder of the workshop.

Lawyers in practice often come to these workshops with questions and case-specific challenges already in mind. This enriches the discussion and the practical exercises and often these workshops zero in on the biggest challenges—how do I move away from an instinctively adversarial approach towards conflict resolution advocacy that is assertive and client-centered? How do I find a community of like-minded lawyers with whom to work on early

negotiation, exchange of information, and so on? How do I create appropriate boundaries with my clients now that we work together so much more collaboratively? How do I develop a practice that pays the bills but is affordable for the large unserved group of unrepresented people? And how do I create a professional community with whom I can exchange both ideas and problems?

B. Teaching Unbundling

Mosten has taught law school courses and professional training on Limited Scope Representation/Unbundling as well as professional training courses ranging from one hour to two days. The following information about learning objectives, skills, assigned reading, discussion questions, and simulated assignments, is an overview gleaned from his current and past efforts to teach unbundled legal services to law students and to practicing lawyers:

Primary learning objectives of such a course could include, without limitation:

- Learn the basic concepts of legal access for unrepresented litigants and of unbundled/limited scope legal services;
- Learn basic lawyering skills to competently advise clients about the advantages and disadvantages of limited scope representation and to represent and/or coach otherwise unrepresented clients to perform a range of specific tasks; and
- Gain insight into policy considerations of the growth of the self-representation movement and unbundled legal services and the relationship of these societal movements to legal access and ethical issues.

Coursework could explore the wide range of lawyering skills required to emphasize, explain and practice these objectives.²²

Assigned reading might consist of a general text as well as supplemental written materials. Topics covered in Mosten and Scully's book²³ (subject to instructor's discretionary selection and edited as-

22. Such skills might include, without limitation: conducting initial client interviews and subsequent counseling regarding specific tasks, obtaining informed consent from clients, drafting correspondence to other lawyers or parties, drafting pleadings, drafting memoranda summarizing client decisions, planning and strategizing for negotiation, negotiating with represented and unrepresented opposing parties, performing court advocacy with a limited scope, planning for client wellness, and law practice management of limited scope practice.

23. FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, UNBUNDLED LEGAL SERVICES: A FAMILY LAWYER'S GUIDE (2017) (describing how attorneys can provide unbundled legal services in the family law context). Suggested topics for classroom instruction include: Embracing the Future: Unbundling as an Effective and Profitable Response to the Pro Se Movement; Unbundling! What It Is and

signments) could be one foundation for unbundling courses, but there is much room for the development of new approaches and teaching materials.

This text could be supplemented (or replaced in whole or part) with selected readings from a variety of sources.²⁴ Mosten utilizes sample written questions for students to answer in writing or discuss during class sessions. He finds that such questions structure student focus for reading assignments and class preparation.²⁵

Why It Works for Clients and Lawyers; Unbundling: How It Works; Be a Limited Scope Non-Court Family Lawyer; Client Intake and the Initial Client Conference; Family Lawyer as Limited Scope Dispute Resolution Manager and Limited Scope Relationship Monitor; Family Lawyer as Limited Scope Drafter of Correspondence; Family Lawyer as Limited Scope Negotiation Coach; Family Lawyer as Limited Scope Litigation Counsel; Limited Scope Representative for Clients Participating in Mediation; Family Lawyer as Collaborative Attorney; Family Lawyer as Limited Scope Preventive Transactional Attorney; Ethical and Malpractice Minefields of Unbundling; Setting Up, Managing, and Marketing Your Unbundling Practice; Providing Limited Scope Services for Specific Family Law Issues: Parenting, Support, and Property Division; Involuntary Unbundling: Limited Scope Services for Underserved Populations; Successful Models for Providing Unbundled Legal Services in Today's Marketplace; and Your First Steps toward Offering Unbundled Legal Services. *Id.* at iii–vii.

24. Suggested resources for classroom instruction include: A.B.A. HOUSE OF DELEGATES, RESOLUTION 108 (2013), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf; A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS (2014), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf; JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS (2d ed. 2013), <http://www.plecanada.org/wp-content/uploads/2017/12/Macfarlane-National-Self-represented-litigants-project-Final-Report-2013.pdf>; JULIE MACFARLANE, THE NEW LAWYER (2d rev. ed. 2018); FORREST S. MOSTEN, *Mindset Quiz: Are You Ready to Unbundle?*, in UNBUNDLING LEGAL SERVICES (2000); FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, THE COMPLETE GUIDE TO MEDIATION (2d ed. 2016); Sue Talia, *Limited Scope Representation*, in REINVENTING THE PRACTICE OF LAW (Luz Herrera ed., 2014); See CAL., FL-950 NOTICE OF LIMITED SCOPE REPRESENTATION (2017), http://iaals.du.edu/sites/default/files/documents/publications/fl950_-_notice_of_limited_scope.pdf; Inst. for the Advancement of the American Legal Sys., *Unbundling Legal Services: Options for Clients, Courts, & Counsel*, UNIV. OF DENVER, <http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services> (last visited May 18, 2018).

25. Examples of these questions for student consideration may include: How do you assess whether your client can handle tasks as a SRL? Does your client have the ability and skills to successfully be a SRL? Do you offer limited legal services? If so, why? If not, why not? Do you offer both full service and limited service legal representation? If so, how does your client make an informed decision how best to utilize your services? How do your clients' demographics fit in with the prototypical SRL? What are your clients' motivations for self-representing? What resources are there for your clients to get legal information and help

In terms of simulated assignments, Mosten recommends preparing a single fact pattern for all modules with discrete facts and instructions for each module. Each module should contain three components: Lawyering Skills; Concepts and Process Skills for working with otherwise unrepresented clients; and substantive and procedural issues. Students should have experience working alone as well as part of a two-student attorney team.²⁶ Each module

inside and outside of your office to be a successful SRL? If you were just to meet with your client once, what value could you offer your client in deciding whether to be a SRL? If your client chooses to be a SRL, what emotional and social challenges might she face? What initial fears do you believe your client would have that she could successfully self-represent and how can you help her not get overwhelmed? Assuming that your client has the following typical concerns of self-represented litigants, how would you address them? a) She believes that despite paying you, you could do very little or nothing more than she can to resolve her matter; b) She is concerned that you will not stand up for her with her spouse and his family; c) She believes that you may push the case to court and not try to settle; d) She doubts that you will really listen to her or hear her needs and concerns; e) She does not believe that you will be clear and relevant in your explanations of options and rights; f) She wonders whether you have the competence to handle her matter. What benefits and risks regarding unbundling would you wish to address with your client in your next client conference? What additional facts do you believe your client needs to resolve her problem? How would you and your client divide the work to gather and present those facts? Assuming that your client wants your help in drafting a letter to the opposing party and/or attorney, how would you and the client divide the work? What preparation would you take to draft the letter? What limited role could you play in preparing documents and witnesses for the hearing if your client represents herself in court? What limited role could you play attending the upcoming court hearing? What tasks would you do and what tasks would your client do? How would you charge for your services? Why would your services be cost effective for your client?

26. Working as a team member is quite common in law practice and should be given more attention in law school education. The Louis M. Brown and Forrest S. Mosten International Client Consultation Competition is based on a two-student team interacting with a client. The Judge's Assessment Criteria for the Competition deal with student teamwork as follows:

Criterion 9: Teamwork

The lawyers, as collaborating counsellors [counselors], should work together as a team with flexibility and an appropriate balance of participation.

Select one of the following:

- 2 The lawyers exhibited no evidence of teamwork.
- 1 The lawyers exhibited evidence of teamwork, but exhibited an apparent lack understanding between the team members and/or demonstrated an imbalance in participation.
- 0 The lawyers exhibited a satisfactory basic level of teamwork.
- +1 The lawyers exhibited very good teamwork skills, but lacked the highest level of understanding between the team members and/or the ability to adapt their approach to the particular client.
- +2 The team members exhibited excellent teamwork showing a very high level of understanding between them and the ability to adapt

should have a feedback and self-reflection task, preferably written.²⁷

C. Teaching Mediation Consulting

In the Mediation clinical course taught at UCLA that was pioneered by Mosten, co-taught by Mosten and Scully for several years, and that is now taught by Scully, training law students to become thoughtful and competent unbundled mediation consulting attorneys is a primary focus. As Scully writes in her current Mediation 707 Syllabus:

Mediation is now a central aspect of lawyers' work in many contexts, including litigation, transactional, private and public sector. Mediation has become a preferred approach to conflict resolu-

Assessment Criteria and Team Feedback Form (2017), https://sites.create-cdn.net/sitefiles/49/0/4/490436/Assessment_Criteria_2017.pdf.

27. Specific simulations might include: Lawyer handles initial phone call with potential client; Lawyer responds in writing to email inquiry from potential client; Initial interview with client including reviewing letter from client's spouse's lawyer; Building Rapport; Explaining Unbundling; Comparing Traditional Full Service and Limited Scope Lawyering Roles; Initial interview with client: Assess Client and Lawyer Appropriateness for Limited Scope; Initial interview with client: Determine Initial Scope of Representation; Initial interview with client: Allocate Tasks and Issues Between Lawyer and Client; Initial interview with client: Discussing and Filling in Limited Scope Client-Lawyer Agreement; Client interview discussing use of a therapist; Client interview discussing possible apology by client to other spouse; Draft Letter Summarizing Initial Interview; Client Meeting to Discuss Options for Drafting Letter from Client to Spouse or From Lawyer to Client Spouse; Draft Letter from Client to Spouse and From Lawyer to Client Spouse; Client Meeting to Plan Negotiation at upcoming informal meeting between client and spouse at the neighborhood coffee house; Client Meeting to Plan Negotiation at upcoming meeting between client and client's spouse and lawyer at spouse's lawyer's office; Negotiation between client, lawyer and client's spouse and lawyer at spouse's lawyer's office; Negotiation between client's lawyer and spouse's lawyer at spouse's lawyer's office; Negotiation with other spouse who is unrepresented; Client Meeting to discuss possible filing of court documents and fill out documents; modify scope, allocation of tasks and amend Client Lawyer Agreement; Client Meeting to discuss mediation: compare mediation with other dispute resolution processes; Client Meeting to select mediator, prepare client opening statement, formulate agenda, and outline proposed offers and responses to other spouse's requests; Mediation session at which lawyer attends to represent client; Client Meeting to discuss upcoming court hearing at which client would represent herself; Client Meeting to discuss upcoming court hearing at which client's lawyer would represent client; Modify scope, allocation of tasks and amend Client Lawyer Agreement; Court Hearing at which client represents herself; Court Hearing at which lawyer represents client for hearing only; Client Meeting after court hearing to discuss results of hearing and preventive next steps; Client Meeting to discuss termination of limited scope relationship; Lawyer Meeting with Business Consultant to discuss modifying practice to incorporate unbundling and consumer approach. Review other successful models of unbundling in the marketplace and discuss which model(s) might work for the lawyer.

tion in most states and many parts of the world, and the number of disputes that are resolved through mediation exponentially exceeds those that are tried in courts. This course combines a theoretical exploration of mediation as a dispute resolution mechanism, including its public policy and ethical implications, with practical training on (a) how to present mediation as a dispute resolution option to clients and obtain their informed consent to participate; (b) how to represent clients effectively in mediation; and (c) how to serve as a neutral mediator. Students will develop these skills via textbook readings and integrated videos, class exercises and discussion, written assignments, and participation in a recorded mediation simulation. The course will also feature guest lectures by prominent mediation professionals.²⁸

Objectives of this course include understanding what mediation is, how it works, and how it differs from traditional litigation and other dispute resolution processes; understanding the roles of the mediator, the parties, and the attorney in the mediation process; and gaining insight into the public policy and ethical implications of mediation, especially regarding mediation confidentiality. Most relevant to the New Lawyer and Unbundling, however, are the primary course objectives, which also include:

- Identifying and practicing the basic lawyering skills needed to advise clients competently about the advantages and disadvantages of mediation, represent clients effectively inside and outside of the mediation room, and appreciate how attorney advocacy differs in the mediation and litigation contexts;
- Improving law students' ability to work with clients, ascertain client interests, balance legal and non-legal issues, and come up with creative solutions for resolving disputes; and
- Encouraging constructive reflection on each law student's unique voice as a professional and personal approach to dispute resolution as a colleague, advocate, and problem solver.

In recognition of the importance of thoughtful and critical introspection and of collaboration to effective modern lawyering, factors such as “demonstrated ability to reflect on performance and formulate concrete strategies for self-improvement” and “collaboration with other students and support of their development and success” are expressly considered in determining grades.

28. School Mediation 707 Course Syllabus, Elizabeth Potter Scully, Lecturer in Law, UCLA Law School (2017) (on file with the author).

The primary text is Douglas N. Frenkel and James M. Stark, *The Practice of Mediation: A Video-Integrated Text 2nd Edition*,²⁹ which has the advantage of featuring video clips accessible online as well as via a CD so that students have an opportunity to observe many consulting lawyers in action. Because the skills involved are difficult to grasp in the abstract, and because there are so many valid approaches, students benefit from watching a wide range of consulting attorneys and enjoy the opportunity to parse each attorney's approach and consider what worked, what might be done differently, and what is or is not congruent with each student's developing professional voice. Similarly, guest lectures are a vital component of the course, as they expose students to different models for how to be a mediation consulting attorney and drive home the point that one size does not fit all.

A specific, detailed fact pattern is distributed at the start of the semester, which forms the basis for many of the specific written assignments and in-class simulations. The weekly written assignments are designed to constitute detailed, thoughtful preparation for in-class simulations, so that the law students feel less "on the spot" and more comfortable and confident trying the simulations in class.³⁰

The course culminates in a recorded mediation simulation where community volunteers play clients. The students who are cast as consulting attorneys are matched with their volunteers well in advance so that they can practice thoroughly preparing a client for a mediation. Students use the recordings to help prepare for their self-assessment and debrief sessions; debriefs may be conducted either individually or in a group during class. They are encouraged to put together a "highlight reel" of their most effective

29. DOUGLAS FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* (2d ed., rev., Wolters Kluwer Law & Business 2012).

30. One sample written assignment based on the fact pattern is:

From the point of view of an attorney with whom [Client] has consulted about the upcoming mediation session, draft an e-mail to Client about the opening statement he will be giving. Your e-mail should include explanation of the following: (1) What you believe to be the main purpose/s of the party opening statement; (2) What the client may wish to include (i.e. his goals for the mediation, his needs and concerns about substance and process, his vision for the ultimate agreement, acknowledgment of positive things about the other party, et cetera); (3) Who, as between the mediator and the other party, do you believe to be the primary audience for the opening statement, and why; and (4) What concrete things the client might wish to do to, on his own or with you, to prepare for giving their opening statement.

Mediation 707 Course Assignment, Elizabeth Potter Scully, Lecturer in Law, UCLA Law School (2017) (on file with the author).

interventions to use in their job search and perhaps even for marketing purposes. (Some students are LLMs who are already practicing attorneys outside the United States. Many students comment that mediation has been their first opportunity to practice working with clients, to think critically about their own attitudes towards conflict, and to confront the challenge of developing a professional persona that is congruent with their personal attributes and values).

D. Teaching Coaching

It is important to prepare students (and lawyers) for the challenges of a coaching role which turns the “lawyer-in-charge” model on its head. This is a challenging shift for many lawyers, and in some ways a paradox—they are now coaching someone to do the work that they would ordinarily provide. But the coaching model in law is just as rewarding, as well as challenging, as coaching in any other area (sport, executive management, etc.). It requires the coach to assess what they can best help with and how to maximize the potential effectiveness of their “coachee”—but to respect the coachee’s ultimate decision-making. It also offers SRLs someone who they can feel is “on their side” and provides a wise and empathetic listening ear.

The coaching model has been taught in a for-credit course at Windsor Law, and law students have offered legal coaching (focusing on procedure and conflict coaching) to local SRLs in family court. The teaching and learning outcomes, and the “coaching contract” that each student makes with their SRL, is modified to reflect the fact that law students cannot provide legal advice. The coaching course objectives at Windsor Law include:

- Understanding the facts of the self-represented litigant phenomenon, including why increasing numbers of individuals are representing themselves and the impact on SRLs;
- Appreciating the emotional and psychological burden of self-representation, and develop skills in listening and offering moral support as well as reality-checks to SRLs; and
- Recognizing the elements of a coaching partnership with a “client” (SRL) and its challenges.

The emotional support provided by having a coach may be an aspect of this practice that we usually overlook. One law student wrote this on completing the course and her experience of coaching a SRL: “As a SRL coach, my most valuable role is allowing the SRL to know that in this swirling twirling mess of professionals and courts and statutes and conflict, there is at least one person who is

completely on the same page.”³¹ Legal coaching workshops for lawyers can of course include a wider range of tasks and strategies that incorporate legal advice.

V. CONCLUSION

The New Lawyer calls out for lawyers to update their approaches and skill sets as conflict resolution specialists. Unbundled/limited scope representation and legal coaching are powerful embodiments of the goals and peacemaking commitment articulated by the New Lawyer. These models presuppose a profound reinvention of the relationship between lawyer and client and a sea change in how we define advocacy. “Business as Usual” in legal education, which remains largely geared towards traditional models of legal practice (i.e. unyielding, lawyer-centric, positional advocacy in a trial context), is rapidly becoming obsolete. For those who first developed these new models and watched them take root, the task now shifts to one of nourishment and to ensuring ongoing future harvests. This article is intended as an invitation to rethink lawyer education in light of these ideas, and a call for the thoughtful and constructive development of new courses, curricula, and educational approaches to best prepare law students and lawyers for client-centered and resolution-oriented practice.

31. Shawna Labadie, *Coaching the Unrepresented: The Best Lesson Learned*, NSRLP NEWS (July 27, 2014), <https://representingyourselfcanada.com/coaching-the-unrepresented-the-best-lesson-learned/>